RECENT CASES.

BANKS AND BANKING — NEGLIGE CE IN SUPERVISION OF BANK OFFICER. — Where a special deposit for gratuitous safe-keeping was made with a bank and stolen by its cashier, *held*, that the bank was not discharged from liability if negligent in retaining the cashier when it ought to have known that he had become unworthy of trust. *Merchants' National Bank* v. *Carhart*, 22 S. E. Rep. 628 (Ga.).

If a bank official undertakes to act in a manner which is *ultra vires* of the corporation, his act will not bind the corporation or furnish a cause of action against it. *Atlantic Bank* v. *Merchants' Bank*, 10 Gray, 532. A bank must use ordinary care, however, in the gratuitous keeping of a special deposit, and the fact that due care has been exercised in procuring a servant in the first place is no reason why diligence should cease in regard to him. *Gilman* v. *Railroad Corporation*, 10 Allen, 233. The decision seems sound, therefore, and is supported by such meagre authority as there is on the subject. *Scott* v. *National Bank*, 72 Pa. St. 471.

BILLS AND NOTES — BONA FIDE PURCHASER — NOTICE. — The payee of a note fraudulently procured from the defendant, indorsed it to the plaintiff for valuable consideration, in violation of an agreement not to convey. The plaintiff had notice of the agreement, but not of the fraud. *Held*, that the plaintiff could recover on the note. *Thompson* v. *Love*, 32 S. W. Rep. 65 (Ark.).

It is difficult to say on what ground the court put this decision, but the right result seems to have been reached. If the agreement were oral and simultaneous with the giving of the note, it would probably be i admissible as varying the effect of the writing; this would dispose of the matter at once. But if the agreement were in writing, or made subsequently for good consideration, the case would be more doubtful. Even such an agreement, however, would not affect the validity of the note, and a breach of it would result only in the personal liability of the promisor. It seems equally clear that no notice of the fraudulent procurement of the note could be imputed to the indorsee because of his knowledge of the agreement.

BILLS AND NOTES — STATUTE OF LIMITATIONS. — Where, for thirteen years, no demand was made upon a promissory note payable thirty days after demand, *held*, since it did not appear that the parties intended to limit the time within which presentment should be made, the holder of the note was not barred from suit against the maker. *Cooke* v. *Pomeroy*, 32 Atl. Rep. 935 (Conn.).

Action does not accrue upon a note payable a certain number of days after demand until demand is actually made. Until such time, then, the Statute of Limitations cannot begin to run against it. There are some authorities which hold that the demand must be made within a reasonable time, which is ordinarily fixed at the period allowed by statute for suing on a note payable at the time of its date. *Palmer* v. *Palmer*, 36 Mich. 487. The court here errs in attempting to distinguish those cases on the ground of extrinsic evidence, for where they do not refer exclusively to the discharge of an indorser, they are clearly wrong. *Wenman* v. *Mohawk Insurance Co.*, 13 Wend. 267.

CARRIERS — BILL OF LADING — DEFICIENCY IN THE CARGO. — Action by the assignee of the consignor of grain by defendant's vessel on the following bill of lading. " All the deficiency in cargo to be paid for by the carrier. . . . and deducted from the freight." On the vessel's arrival at the port of destination it was ascertained that some 2,000 bushels less than supposed were on board, the deficiency being due to a mistake in the weighing at the port of departure. *Held*, that the carrier was liable for the shortage in the cargo though the grain had never actually been loaded on board the vessel. *Sawyer* v. *Cleveland Iron Min. Co.*, 69 Fed. Rep. 211.

Where the case arises between the carrier and a *consignee*, the bill of lading and facts being otherwise similar to those set out above, the consignee is allowed to recover. " Otherwise," says the court in *Merrick* v. *Certain Wheat*, 3 Fed. Rep. 340, " there would be no necessity for inserting the stipulation at all, because the consignee, without any express stipulation, has the right to deduct from the freight a deficiency in the cargo actually received by the carrier and arising from his fault, . . . and it is not reasonable to suppose the parties meant to insert a useless condition in the contract." The court in the present case thought the same rule applicable to a *consignor*, as no evidence showed the consignor was privy to the mistake, he being entirely unrepresented at the weighing in question except by the carrier, and so in the same relative position in this respect as a consignee would b ar to the carrier. If the consignor could have recovered, then his assignee, the plaintiff can recover.

CONSTITUTIONAL LAW — EXEMPTION OF VETERANS FROM CIVIL SERVICE RULES. — The Constitution of New York, Art. 5, § 9, provides that appointments in the civil service shall be made according to fitness, which shall be determined so far as is practicable by competitive examination; but veterans shall be entitled to preference without regard to their standing on any list from which such appointment may be made. *Held*, a statute providing that when a veteran is an applicant competitive examinations shall not be deemed practicable if the salary of the position does not exceed $4 per day, but that the only examination shall be one to test the ability of the applicant to fill the position, is unconstitutional and void. *In re Keymer*, 35 N. Y. Supp. 161.

The provisions of the New York statutes in regard to veterans in the civil service were gradually relaxed from 1883 to 1894, when the legislature declared that the civil service laws should not apply at all in cases where the compensation did not exceed $4 per day. This statute has been abrogated by the new Constitution (*In re Sweeley*, 33 N. Y. Supp. 369), the provisions of which in regard to the preference of veterans are very similar to those of the law which was passed by the Massachusetts legislature last June over the Governor's veto. Acts of Mass., 1895, chap. 501. The court says that the power to declare examinations impracticable in one case implies the power to declare them impracticable in every case, and thus to annul the whole constitutional provision. The judgment of the lower court awarding a mandamus to the Commissioners to give the orator a non-competitive examination is accordingly reversed.

CONSTITUTIONAL LAW — FEDERAL COURTS — FOLLOWING STATE DECISIONS — CHANGE OF RULING. — A federal court made a decision respecting the rights of parties before it in certain property, based upon a series of decisions of the highest court of a State, as to the interpretation of a statute of such State, and the decision was affirmed upon appeal. In a later case respecting the identical property, the State court reversed its former decisions. *Held*, this fact does not make it the duty of the federal court to reverse its decision as to the rights of the parties in the same property, in proceedings subsequently arising. *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006.

The court says (though the decision of the case does not require it) that "it will doubtless be proper for this court, in any case hereafter arising, where rights have accrued subsequent to the last decision of the Supreme Court of the State upon the question, to give due consideration to the later rulings of that tribunal." This would seem to be sound, though no cases in which this additional step has been taken, have been called to our attention. The decision is in accordance with authority. *Burgess* v. *Seligman*, 107 U. S. 20. A note at page 34 collects the principal cases bearing upon the subject.

CONSTITUTIONAL LAW — PUBLIC USE — IRRIGATION. — An act of California allowed fifty landholders, whose lands were susceptible of a common system of irrigation, to submit a plan of irrigation for the whole common district, which plan, if accepted by two thirds of the landholders of the district, was to be binding. To meet expenses, all the lands of that district could be assessed, and for failure of payment, sold. The landowners could be heard only on the question of valuation. The act was *held* unconstitutional. *Bradley* v. *Fallbrook Irrigation District*, 68 Fed. Rep. 948.

The court objects to this as a taking of property for other than a public use, on the ground that the landowners of the district were the only persons benefited. But it is difficult to distinguish this from such cases as *Hagar* v. *Reclamation District*, 111 U. S. 701, where a similar act to drain swamp lands was upheld. It is not merely a question of the public health; the legislature may provide also for other phases of the public benefit, and it would seem that the turning of large tracts from deserts into gardens was a suitable field for such legislative consideration. This view was taken in a recent case in Nebraska, which held that the taking of land for purposes of irrigation lay within the discretion of the legislature. *Paxton Irrigating Co.* v. *Farmers' Irrigation Co.*, 64 N. W. Rep. 343 (Neb.).

From another aspect, too, it is proper for the legislature to interpose a controlling hand. The irrigation necessary to improve these lands could only be accomplished by the co-operation of all the landowners, and it has been laid down that the legislature has a power "to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which by reason of the peculiar natural condition of the whole tract cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful at their joint expense." *Wurts* v. *Hoagland*, 114 U. S. 613. The court, in fact, seems to admit this view, and goes off to discuss the case on another ground.

CONTRACTS — ACCORD AND SATISFACTION — EXECUTORY ACCORD NOT ENFORCEABLE. — Plaintiff and defendant made a contract for the delivery of lumber on May 20, 1889. After partial execution disputes arose, and on December 30 a new contract was made modifying the old one, but it was not executed. Plaintiff sued on old contract. *Held*, that new contract was an accord that did not discharge the old one until per ormance. *Crow* v. *Kimball Lumber Co.*, 69 Fed. Rep. 61.

Whether one contract can be discharged by the substitution of another is said to depend on whether the parties intend the new agreement or its performan e to be the consideration for the release of rights under the old one. This is no doubt true, but when the new agreement, as in the present case, offers no reliable clue to the intent of the parties, which will they be presumed to intend? When the second contract contains mutual promises to do acts other than merely forbearing to exercise rights given by the old contract, it would seem that the presumption should be in favor of an intent to substitute the new agreement, not its performance, for the old one. Clearly both contracts are not meant to be carried out, and by the new one *both* parties have promised to do acts inconsistent with the old one. It is therefore hardly reasonable to suppose they mean to w it till performance on either side before abandoning the old contract. Where only one party makes a new promise, and the other merely agrees to forbear, it may be reasonable to suppose that the execution of the promise, not its giving, is the consideration. Compare *Babcock* v. *Hawkins*, 23 Vt. 561; *Morehouse* v. *Bank*, 98 N. Y. 503; *Christie* v. *Craige*, 20 Pa. St. 430.

CONTRACTS — DEFENCE OF ILLEGALITY. — Plaintiff declared on defendant's mortgage note. Defendant pleaded that plaintiff, in loaning the money held by him as county treasurer — the consideration for defendant's note — committed the crime of embezzlement under R. S. Indiana, 1894, § 2019. Plaintiff demurred. *Held*, overruling plaintiff's demurrer, (1) the record does not disclose any interest of the county in this action; (2) plaintiff having committed a crime in giving the consideration, is thereby precluded from recovering for his own benefit. *Winchester Light Co.* v. *Veal*, 41 N. E. Rep. 334 (Ind.).

It is a well recognized legal principle that a statute ought not to operate to the detriment of those whose interests it was aimed to protect. On this principle, in the present case, if the county appears from the facts stated in the record as interested in the outcome of this action, plaintiff's demurrer should be sustained. *Bowditch* v. *Ins. Co.*, 141 Mass. 292. From the facts stated in the pleadings it is clear that the county had a right to regard plaintiff as trustee of the note for the county. For aught that appears on the record this right of the county in the note continues in existence; if so, the county has an interest in this action. It would therefore seem that the plaintiff should have prevailed on his demurrer.

CONTRACTS — PUBLIC POLICY. — In accordance with a Resolution of the Massachusetts Legislature, the Governor and Council employed the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute the claim of the Commonwealth for a refund of the direct tax paid the United States in 1861. Plaintiff held the office named, and consequently was appointed. His compensation was to be two per cent of any amount he should collect, to be paid out of the proceeds received therefrom. By the efforts of himself and similar agents from other States, an act was passed providing for the refunding of the direct tax. *Held*, petitioner could recover from the Commonwealth. *Davis* v. *Commonwealth*, 41 N. E. Rep. 292 (Mass.).

The question of public policy is always a broad one. Such a contract is that set out above, if made between two individuals, would, according to the trend of authorities, be void as against public policy. *Trist* v. *Child*, 21 Wall. 441. But the legislature can regulate public policy. They are the representatives of the people. As the court says, "The legislature can determine for itself what public policy requires or permits to be done in the prosecution, in any form of claims of the Commonwealth against the United States." The resolution was not passed to favor Davis. It was enacted for the good of the people of Massachusetts, and as it was necessary to pay some one to aid in the passing of the refunding law, the case does not seem to be one in which the legislature cannot legally pass an act setting aside the general law. At all events, as the legislature had sanctioned the contract made between the Governor and Council and the petitioner, and as it had a right to provide for the compensation of its own agents, the court could not, as a judicial body, declare the contract void.

CONTRACTS — RECOVERY ON ULTRA VIRES CONTRACTS — RES JUDICATA. — Contract for money paid without authority of plaintiffs to defendants by a joint manager of plaintiff and defendant. Defendant contended, (1) that the contract which gave rise to the payment was *ultra vires*: (2) that the plaintiff had sued defendant on this claim in the court below, and was estopped by the judgment of that court in his favor to raise

the question. *Held* by a majority of the court, that, as the present had formed one of three distinct claims in the lower court, and neither its record nor the defendant's answer in the present case showed that it had been adjudicated there, the judgment was no estoppel, and that as all agreed that the fact of the contract being *ultra vires* was no bar to the plaintiff's claim, he ought to recover. *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 41 N. E. Rep. 268 (Mass).

That such a claim as the present is not barred by the fact that plaintiff corporation acted *ultra vires* is well settled: The recovery should be in quasi contract, and not on the contract itself, as it is illegal. In the first form of action the law implies a promise, and so the illegal contract is not put in question Keener on Quasi Contracts,p. 272, note 1. Whether the claim is barred by a previous judgment, in which it formed one of three distinct issues, is a more difficult question, and was the one on which the court differed. The majority seems to think that the defendant should show that the claim was not adjudicated below. But why should the burden of establishing this be on defendant? The judgment of the court below raises at least a *prima facie* case against plaintiff's claim, and, if it does not entirely estop him from showing that it was not adjudicated there, it at any rate puts on him the burden to show it was not. *Paine* v. *Ins. Co.*, 12 R. I. 440. The opinion of the majority of the court is open to doubt on this point, even if one does not feel inclined to go as far as Mr. Justice Holmes, who, in dissenting, remarks, "When the pleadings present three distinct issues, and the final decree is for the plaintiff in two of them and is silent as to the third, it has the same effect with regard to that issue as if it had been expressly for the defendant." *Goodruh* v. *Yale* 8 Allen, 454 ; *Schmidt* v. *Fahensaorf*, 30 Ia. 498.

CONTRACTS — STOCK GAMBLING — RECOVERY OF SECURITIES.— Plaintiff and defendant had entered into a contract by way of wager on the differences of tape prices of stocks. As security for payment the plaintiff deposited certain shares, and for the recovery of these this action is brought. The defendant relied on the following clause in the Gaming Act of 1845: "No suit shall be brought . . . for the recovery of any valuable thing . . . deposited in the hands of any person to abide the event on which any wager shall have been made." *Held*, that this clause applies only to deposits to which the happening of the event is to determine the title; that the securities are not of such a nature, and may be recovered. *Strachan* v. *Universal Stock Exchange Limited*, [1895] 2 Q. B. 329.

This decision seems sound and to accord with the rule allowing recovery of deposited stakes when depositor has repented and demanded the wager of the stakeholder before the happening of the event. The ground of the decision in both cases is that it does not aid or affirm an illegal contract, but arrests it.

CORPORATIONS — FLOATING SECURITY — SUBSEQUENT MORTGAGE OF CHARGED ASSETS. — The defendant railway company issued a set of debentures, and, as floating security for the payment of interest thereon, charged all its property, present and future. A condition provided that "notwithstanding the said charge the company shall be at liberty to use, sell, or otherwise deal with any part of its property until default shall be made in the payment of interest for three calendar months." After an instalment of interest had fallen more than three months in arrear, the company mortgaged a part of its assets to secure the payment of a new set of bonds then issued. The plaintiff on behalf of the debenture holders brought this action to enjoin the payment of the money on the bonds. *Held*, by the Court of Appeal, reversing decision of North, J , that after the expiration of the three months the security still remained floating and the assets at the disposal of the company until some action was taken by the debenture holders to enforce the secur ty. The bondholders therefore had priority, the mortgag having been in trust for them. *Government Stock Investment and other Securities Co.* v. *Manila Ry. Co.*, [1895] 2 Ch. 551.

The reversal of the decision of Nor h, J., seems to have rested altogether on a mere difference of interpretation. North, J., was of opinion that, the charge as floating security being not enforceable until interest was three months in arrear, the proper inference was that at the end of that period it became a fixed charge without any action on the part of the debenture holders, and so granted the decree prayed for. The view entertained by the Court of Appeal would seem to be the sounder.

CORPORATIONS—POWERS OF A CITY IN REGULATING THE PRICE OF GAS. — In 1886 the city of Iola granted to the Iola Gas and Coal Co the right to lay pipes, etc., and to supply the city with gas. No rates were prescribed. In 1889 the company assigned all its rights and interests to Pryor and Paullin. In 1895 the city passed an ordinance making it unlawful for any person or firm to charge for gas anything in excess of certain prices specified in the ordinance. *Held*, that said ordinance is inoperative and void as to Pryor and Paullin, in so far as it purports to establish prices

for gas furnished by them to private consumers. *In re Pryor*, 41 Pac. Rep. 958 (Kan.).

There is some conflict of opinion as to whether even the legislature, having once granted a franchise, may thereafter step in and assume to regulate prices. See *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347. Where the legislature has reserved this power, it has been held that it may by express terms delegate it to a municipal corporation. *State of Ohio* v. *The Cincinnati Gas Light Co.*, 18 Ohio St 263. The precise question presented by the principal case has arisen in but few instances. The decision seems manifestly correct. The case decides that, by common law, a municipal corporation has no power to regulate prices, nor has it any such power implied from the legislature under a general statute providing that gas and water companies shall be subject to such regulations as the municipal authorities shall prescribe. *City of Rushville* v. *Rushville Gas Co.*, 132 Ind. 575, is directly *contra*, but that case has been overruled by *Lewisville Gas Co.* v. *The State*, 135 Ind. 49, which is in accord with the decision in the principal case. See also *City of St. Louis* v. *Bell Telephone Co.*, 96 Mo. 623, *accord*.

CRIMINAL PROCEDURE — EXCESSIVE SENTENCE — HABEAS CORPUS — JURISDICTION. — Petitioner was sentenced to imprisonment for five years for a crime for which the court had no authority to impose a sentence in excess of two years. He applied for a writ of habeas corpus. *Held*, that, when a court had jurisdiction of the person and the offence, the imposition of an excessive sentence was not an act without its jurisdiction which could be attacked by habeas corpus if the legal part of the sentence was separable from the excess; but was merely an error which as to the excess should be corrected by writ of error. *In re Taylor*, 64 N. W. Rep. 253 (S Dak.).

Like *United States* v. *Harmon*, 68 Fed. Rep. 472, (noted in 9 HARVARD LAW REVIEW, 220,) this case and the authorities collected therein show the unmistakable drift of the courts toward freeing the criminal law from some of the technicalities that serve only to hinder justice. There is no good reason why a man fairly convicted of crime should be released altogether because he receives too heavy a sentence, when there is the alternative of re-sentencing him for the proper term. The weight of authority, composed largely of very recent decisions, is now with the principal case, the growth of opinion in the U. S. Supreme Court being clearly traceable from the strong contrary dictum in *In re Graham*, 138 U. S. 461, through *Re Bonner*, 151 U. S. 242, to the opposite decision in *U. S.* v. *Pridgeon*, 153 U. S. 48.

CRIMINAL PROCEDURE — IRREGULAR VERDICT — DOUBLE JEOPARDY. — Defendant was indicted for grand larceny, and when the jury retired they were told to send for the judge if they arrived at a verdict during the recess of the court. Instead of doing this, the jury, when they reached a decision, sealed their verdict, gave it to the clerk of the court, and separated. When the court reconvened, the judge assembled the jury in their box, opened and read the verdict in their presence and hearing. On exception to the court's refusal to discharge the defendant for this irregularity an appeal was taken. *Held*, that the writing delivered to the clerk in the absence of judge and defendant was no verdict, and its acceptance by the judge followed by an unauthorized discharge of the jury was equivalent to an acquittal of the defendant, who could not be placed in jeopardy a second time. *Hayes* v. *State*, 18 So. Rep. 172 (Fla.).

It is well settled that the discharge of a jury, except in case of necessity, when the indictment is valid and the defendant objects, bars any further trial. But the weight of authority seems also to hold that a verdict rendered in the absence of the prisoner, while entitling him to a new trial, does not discharge him. *State* v. *Hughes*, 2 Ala. 102; *Rose* v. *State*, 20 Ohio St. 31; *People* v. *Perkins*, 1 Wend. 91; *Sneed* v. *State*, 5 Ark. 431. If the above decision is right, it must be on the narrow ground that, because the jury were not expressly authorized to deliver a sealed verdict, their written decision was absolutely void, and the judge's failure to poll them afterwards left the case without a verdict from them, though they expressed no dissent when their written opinion was read in open court. In *Nomaque* v. *People*, 1 Breese, 145, 12 Am. Dec. 157, a similar point was decided differently.

EQUITY — MORTGAGE OF FUTURE CROPS. — A lease of farm lands contained a proviso that the property in the crop should be in the lessor until a portion of it had been paid in as rent, and until the farm hands were paid. Before the crop was sown, it was mortgaged to defendant; when grown, it was put in possession of plaintiff, an unpaid farm hand, who was to satisfy his lien, pay the rent, and return the surplus to the lessee. In an action of trover, *held* for defendant. *Lawrence* v. *Phy*, 41 Pac. Rep. 671 (Or.).

A clear case of a prior mortgage being preferred to a later lien, even though the

subject matter in dispute was not a legal interest, but merely the lessee's equitable claim. It is worth remarking, however, that this was a mortgage of future crops which were to come from the land leased by the mortgagor.

EVIDENCE — ACTION FOR DEATH OF EMPLOYEE — VERBAL REPORT OF FOREMAN. — At the trial of an action by an administratrix against a corporation to recover damages for the death of her husband, the defendant questioned its superintendent regarding verbal reports made to him by a deceased foreman as to the condition of the works where plaintiff's intestate was employed. This testimony was admitted. The court said, "If it was customary for the subordinate to go and report at any time in the day verbally, the witness, if acquainted with what that report was, could testify as to it." *Williams* v. *Walton & Whann Co.*, 32 Atl. Rep. 726 (Del.).

From the nature of the subject, the authority upon this point is meagre. The above ruling would seem to accord with that exception to the rule against hearsay which admits oral statements made in the course of duty by a deceased person, a doctrine which originated in a dictum of Lord Campbell in the *Sussex Peerage Case*, 11 Ch. & Fin. 113, and which is now considered as established in England. With the exception of the principal case, no American ruling upon the subject has been called to our attention. The admission of such evidence in this case may prove to be a step toward the adoption by our courts of the English doctrine.

EVIDENCE — POST-TESTAMENTARY DECLARATIONS. — Bill to set aside a will. Both parties admitted the execution of a will, but plaintiff contended that the genuine will had been destroyed, and that the one in court was a forgery. The latter gave defendant a fee simple in certain land, the former, as was alleged, gave defendant only a life estate with remainder to the plaintiff. In order for the plaintiff to be allowed to contest the will, he had to show that he was interested in the estate; for this purpose he introduced declarations made by the testator shortly before his death, stating the contents of the will as alleged. The evidence was admitted. *McDonald* v. *McDonald*, 41 N. E. Rep. 336 (Ind.).

The court cites a list of authorities to show that declarations of a testator are admissible to prove the contents of a lost will. The furthest extent to which these authorities appear to go, however, is that post-testamentary declarations are admissible to prove the contents of a lost will only when corroborative of other evidence. *Sugden* v. *Lord St. Leonards*, 1 Pr. Div. 154; but see *Woodward* v. *Goulstone*, 11 App. Cas. 469. In the principal case there was no other evidence of the contents. The decision might possibly stand as an extension, admitting such evidence where proof of contents was merely collateral to the issue; but it is difficult to see why the purpose for which a fact is used should alter the mode of its proof.

GARNISHMENT — COUNTY AND MUNICIPAL CORPORATIONS NOT SUBJECT TO GARNISHMENT. — *Held*, that a board of county commissioners is not subject to garnishment under a statute which makes any "person" liable, and which further states "person" to include corporations. The case is rested on *Stermer* v. *Board of Com'rs*, 38 Pac. Rep. 839, where a county board is held to be only a quasi corporation. *Gann* v. *Cribbs et al.*, 41 Pac. Rep. 829 (Col.).

That a municipal corporation is not subject to garnishment has been held in the recent case of *Leake et al.* v. *Lacey*, 22 S. E. Rep. 655 (Ga.). The ground of public policy stated in the latter case seems the true reason for such decisions as these, the court often straining the text of a statute under the impression that it is for the public benefit that those contracting to do public works shall not have the necessary supply of money cut off by garnishment while in the hands of the public corporation for which they work.

JUDGMENTS — VALIDITY — DISQUALIFIED JUDGE. — *Held*, the effect of a statute providing that "no justice of the peace shall sit in any cause when he may be interested or where he may be related to either party within the third degree," is to deprive a justice of the peace of all jurisdiction of such causes; judgment entered by a justice in such cause is void, and he is liable in damages for property seized under it. *McVea* v. *Walker*, 31 S. W. Rep. 839 (Tex.).

A substantially similar statute to that involved in the principal case is to be found in many States, but the courts of the different jurisdictions are not agreed as to the effect to be given to it. According to one view, the judgment of a judicial officer sitting on the cause of a relative in contravention of the statute is merely voidable, and consequently not open to collateral attack; according to the other view, such judgment is absolutely void. The former view is upheld in Black on Judgments, § 174, the latter in Freeman on Judgments, § 146, and in Cooley on Torts, 421. The different jurisdictions appear to be pretty evenly divided on the question. See authorities collected in the references.

PARTNERSHIP — SET-OFF OF A PERSONAL DEBT OF ONE PARTNER.—A partnership was owed by the estate of a deceased person the sum of $40,604.55. A member of the partnership, Thomas H. Allen, owed the estate $38,678.28, a debt growing out of his acts as executor of said estate. *Held*, that Allen could set off a personal judgment for that sum against himself in favor of the estate against the indebtedness of the estate to the firm. *Nugent et al.* v. *Allen et al.*, 32 S. W. Rep. 9 (Tenn.).

As a rule, a debt which is owed by one of the members of a firm cannot be set off at law against a debt owing to the firm. There are exceptions to this rule, however. One exception is that if the parties have agreed expressly or impliedly that a debt owing by one of them can be set off against a debt owing to the firm, effect will be given to that agreement and the case taken out of the general rule. 1 Lindley on Partnership, *294; *Rogers* v. *Batchelor*, 12 Peters, 221. The principal case falls within this exception, as the court thought that Thomas H. Allen had, if not express, at any rate implied authority to set off the two debts.

PLEDGE — CONVERSION — TORTIOUS SALE BY PLEDGEE. — A pledgee made a tortious sale of his pledge; no tender of the indebtedness had been made. *Held*, the tortious sale by the pledgee gives the pledgor right to immediate possession, and he may maintain trover without making tender of the indebtedness. *Waring* v. *Gaskill*, 22 S. E. Rep. 659 (Ga.).

The opinion here handed down does not discuss the authorities bearing on the point decided, nor does it disclose the reasoning on which the decision is based. This is the more to be regretted because the cases *contra*, *Donald* v. *Suckling*, L. R. 1 Q. B. 585, and *Halliday* v. *Holgate*, L. R. 3 Exch. 299, are cited by the text-books without disapproval. The reasoning of the English cases is, that a sale or a repledge for a larger amount, though a tortious act, does not terminate the pledgee's interest in the pledge, i. e. does not give the pledgor a right to immediate possession; the pledgor has not such right to immediate possession until tender of the indebtedness, and until he has such right he cannot maintain trover. In *Whitaker* v. *Sumner*, 20 Pick 399, *Balt. Ins. Co.* v. *Dalrymple*, 25 Md. 269, at 306, *Bulkely* v. *Welch*, 31 Conn. 339, and *Stearns* v. *Marsh*, 4 Denio, 227, at 231, a misuser of the pledge was held to give the pledgor right to immediate possession. The doctrine of these cases is, it is submitted preferable to the English view; the contract is interpreted as by implication of law giving the pledgor a right which in the ordinary case of pledge, as it seems to us, every pledgor would require and every honest pledgee would willingly concede, if their attention were directed to this point at the time of making the contract of pledge In accord with the principal case see the dissenting opinion of Mr. Justice Williams in *Johnson* v. *Stear*, 15 C. B. (N. S.) 330.

PROPERTY — LANDLORD AND TENANT — IMPLIED CONDITION OF FITNESS FOR HABITATION. — Where one hires furnished lodgings, there is no implied agreement that they shall continue habitable throughout the term, and therefore, when the family of the lessor becomes infected with scarlet fever which is communicated to that of the lessee, the latter cannot recover from the former medical expenses thereby incurred. *Sarson* v. *Roberts*, [1895] 2 Q B. 395.

There is in general no implied covenant on the part of a lessor that the premises are fit for habitation, nor that he will make any repairs during the term. An exception has been laid down in the English courts to the effect that in a lease of a furnished house or of apartments there is a warranty that the premises are reasonably inhabitable and if they are not so the tenant may quit without notice. *Smith* v. *Marrable*, 11 M. & W. 5 *Wilson* v. *Finch-Hat'on*, L. R. 2 Ex. D. 336; *Bird* v. *Lord Grevile*, 1 C. & E. 317. These cases have been questioned in the United States, and even in England the exception has never been extended far enough to imply a warranty that the premises shall remain in tenantable condition throughout the term. See *Howard* v. *Doolittle*, 3 Duer, 464; *Dutton* v. *Gerrish*, 9 Cush. 89.

PROPERTY — STATUTE OF LIMITATIONS — ADVERSE POSSESS'ON. — A landowner, in the belief that his land extended to a certain line, occupied up to such line and cultivated the land as his own for more than the statutory period of limitation. In fact, a part of the adjoining section was included within the line, but he never intended to claim more than rightfully belonged to him. *Held*, that the possession was not adverse. *Davis* v *Caldwell*, 18 So Rep. 103 (Ala.).

This is a step back by the Alabama court, and is to be regretted. The doctrine here laid down finds support in the case of *Brown* v. *Cockerell*, 33 Ala. 38, cited in the opinion, but is almost nullified by the later decision in *Alexander* v. *Wheeler*, 69 Ala. 332, a so cited. The courts of Kansas, Iowa, Maine, and one or two other jurisdictions, have reached the same result. but the current of authority is against it and it seems indefensible on principle. The fallacy arises from laying too much stress upon

the fact that if the mistake were known, no claim of title would be made, and too little upon the fact that in truth the claim is made. A convincing statement of the correct view may be found in *French* v. *Pearce*, 8 Conn. 439, and *Seymour* v. *Carli*, 31 Minn. 81.

PROPERTY — TACKING OF ADVERSE POSSESSIONS. — *Held*, that where one encloses and occupies more land than is covered by the description in his deed, and sells by the same description to another, who enters into possession of all the land enclosed, the successive possessions may be tacked to make up the period required by the Statute of Limitations. *Davock* v. *Neaton*, 32 Atl. Rep. 675 (N. J.). See NOTES.

QUASI CONTRACTS — FALSE REPRESENTATIONS — SURVIVAL OF ACTION AGAINST EXECUTOR. — Where a woman induces a man to marry her by falsely representing herself as a single woman, his only remedy is an action of tort for the personal injury, and no action will lie against her executor on the theory of a quasi contract. *In re Payne's Appeal*, 32 Atl. Rep. 948 (Conn.).

It is well settled that where a man falsely represents himself as unmarried, and thereby induces a woman to marry him, an action for deceit will not survive against his personal representative. *Price* v. *Price*, 75 N. Y. 244; *Grimm* v. *Carr*, 31 Pa. St. 533. Whether an action for services will survive on account of the unjust enrichment of the estate of the wrongdoer must be considered an open question. The Supreme Court of Massachusetts, influenced perhaps by the analogy of those cases in which it has been laid down that a disseisee cannot maintain a suit in assumpsit for mesne profits against a disseisor until he recovers the real estate by ejectment, has decided that a woman cannot sue an administrator to recover the value of services rendered to her husband's estate under the belief that she was his lawful wife, although this belief is solely induced by the husband's fraudulent misrepresentations. *Cooper* v. *Cooper*, 147 Mass. 370. The Connecticut court accepts this line of reasoning. The contrary view is maintained in *Higgins* v. *Breen*, 9 Mo. 497, and *Fox* v. *Dawson*, 8 Martin, 94. There would seem to be small difficulty on principle in allowing a recovery to the extent to which the estate of the tortfeasor has been benefited. The fraud of the deceased has caused the ignorance of the facts, and if the injured party chooses to ignore the personal injury and sue for the unjust enrichment, he should be allowed to do so. Keener on Quasi Contracts, p. 321 *et seq.*

SALES — FACTORS ACTS. — *Held*, that the word "sale" in Massachusetts Factors Act does not include a completed sale, and that where there is larceny there can be no "intrusting" within the meaning of the act. *Prentice Co.* v. *Page*, 41 N, E. Rep. 279 (Mass.). See NOTES.

SALES — WHEN TITLE PASSES. — C., a hotel proprietor, ordered of plaintiff two settees to be manufactured by the latter; when finished plaintiff delivered them to C. There was no agreement as to the time of payment. C. before paying plaintiff sold to defendant, and plaintiff brought replevin against defendant. The presiding justice in his instructions practically directed a verdict for plaintiff. Defendant brings exceptions. *Held*, sustaining exceptions that the presumption is that the parties intended to make payment and delivery concurrent conditions If vendor waives the condition of payment, title vests in the vendee; delivery without payment is evidence of a waiver, and it should be left to he jury whether there was such a waiver. *Geo. W. Merrill Furniture Co.* v. *Hill*, 32 Atl. Rep. 712 (Me.).

The decision itself is undoubtedly correct, but the language of the court is, to say the least, loose. The error is in regarding the payment as presumably a condition precedent to the passing of title, when it is only a condition precedent to delivery, and a waiver of it has no effect on title In case of goods to be manufactured, presumably title passes upon appropriation and acceptance. *Wilkins* v. *Bromhead*, 6 M. & G. 963; *Smith* v. *Edwards*, 156 Mass. 221. Some authorities seem to say that title passes as soon as the things is finished. *Goddard* v. *Binney*, 115 Mass. 450; 2 Kent's Comm. *504. A condition *may* go either to title or to delivery, but even where it goes to title, if the goods are put into the hands of the buyer, it seems a sound doctrine that there is presumably a waiver of the condition, *Upton* v. *Sturbridge Cotton Mills*, 111 Mass. 446; *Haskins* v. *Warren*, 115 Mass. 514; *Comer* v. *Cunningham*, 77 N. Y. 391. The doctrine that in a cash sale presumably title does not pass till cash is paid, *Paul* v. *Reed*, 52 N. H. 136. (a doctrine denied by Blackburn so far as mercantile transactions go,) is generally applied where the contract is for the sale of specific goods, rather than of goods to be manufactured.

TORTS — DEATH BY WRONGFUL ACT — CONTRIBUTORY NEGLIGENCE OF SOLE BENEFICIARY. — *Held*, that where a father sues as administrator to recover for death

of child, and he is sole beneficiary, his contributory negligence is a good defence. *Bamberger* v. *Citizens' St. R. Co.*, 31 S. W. Rep. 163 (Tenn.). See NOTES.

TORTS — UNFAIR COMPETITION — FRAUDULENT SIMULATION. — Declaration that defendant in adopting a particular style of wrapper and in labelling his wares "Thedford & Co.'s Black Draught," intended to and did trick the public into buying defendant's medicine in the belief that they were purchasing a medicine of plaintiff's manufacture which was put on the market in similar wrappers, and labelled "Thedford's Black Draught." Defendant demurred. *Held*, overruling the demurrer, a plaintiff has a right of action against a defendant who intentionally tricks plaintiff's customers into buying defendant's wares in the belief that they are of plaintiff's manufacture. *Thedford Medicine Co.* v. *Curry*, 22 S. E. Rep. 661 (Ga.).

The principle here applied is not a new one, nor even a new application of an old principle. It is the same principle and the same application of it by virtue of which the common law protected the use of trademarks before their use was protected by statute. Lord Blackburn in *Manufacturing Co.* v. *Loog*, 8 Appeal Cases, 15, at 29, 30. Plaintiff's right which defendant has violated is not a right to the exclusive use of a particular name or a particular kind of wrapper for his wares; "his right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." Lord Langdale in *Croft* v. *Day*, 7 Beav. 84, at 88. This principle and its application to cases not distinguishable from the principal case are well established in England and America. *Perry* v. *Truefett*, 6 Beav. 66; *Blofield* v. *Payne*, 4 Barn. & Ad. 410; *Sykes* v. *Sykes*, 3 B. & C. 541; *Lee* v. *Haley*, 5 Ch. Appeals, 155; *Stone* v. *Carlan*, 13 Law Reporter, 360; *Nail Co.* v. *Bennett*, 43 Fed. Rep. 800; *Manufacturing Co.* v. *Manufacturing Co.*, 138 U. S. 537, at 549. See also 4 HARVARD LAW REVIEW, 321; 5 HARVARD LAW REVIEW, 139.

REVIEWS.

THE MIRROR OF JUSTICES. Edited for the Selden Society by William Joseph Whittaker, with an Introduction by Frederic William Maitland. London, 1895.

The chief value of this publication is the proof it gives that the "Mirror" is valueless. This book had been freely cited by Coke and other lawyers of the sixteenth and seventeenth centuries; and Judge Gray not long ago considered at length an extract from it in the very important case of *Briggs* v. *Light Boats*, 11 All. 157. It is therefore well worth while to have its unreliability established; and that this is done will appear from the following statements in the Introduction: "Our author's hand is free, and he is quite able to do his lying for himself, without any aid from Geoffrey of Monmouth or any other liar. He will not merely invent laws, but he will invent legislators also; for who else has told us of the statutes of Thurmod and Leuthfred? The right to lie he exercises unblushingly. . . . Religion, morality, law, these are for him all one; they are for him law. . . . That he deliberately stated as law what he knew was not law, if by law we mean the settled doctrines of the King's court, will be sufficiently obvious to any one who knows anything of the plea rolls of the thirteenth century. . . . One word is wanted to make this true; the word 'not.' Our author knows that as well as we know it." All this is as true as it is vigorous, and it is evident that a book of which such things can be said is not one to be rashly used as authority.